Nos. 15516 - 15519

United States Court of Appeals

For the Ninth Circuit

KEITH C. MORTON, Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, Appellee.

ROBERT E. KUNTZ, Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, Appellee.

GENE A. PICOTTE, Appellant,

vs.

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JOHN W. MAHAN, Appellant,

vs.

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Brief of Appellee Railway Company

Appeal from the United States District Court
for the District of Montana

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STATEMENT OF ISSUE

On July 2, 1864, Congress passed the original Northern Pacific Land Grant Act *(C. 217, 13 Stat. 365)* which authorized construction of a line of railroad between Lake Superior and Puget Sound; made a grant of a specified amount of land in defined "place limits" to subsidize the construction of the road; gave the company

the right to acquire patents to the sections so acquired; gave the company a right of indemnity to fulfill the grant to the extent of the amount originally contemplated, in the event of a deficiency in the amount of land in the "place limits" specified; and authorized a "first indemnity strip" in which the right of indemnity could be consummated so that the full amount originally granted would be given.

On May 31, 1870, by a Joint Resolution *(Res. 67, 16 Stat. 378),* Congress authorized construction of a new line of railroad between Portland and Puget Sound not contemplated by the 1864 act; made a new land grant between Portland and Puget Sound containing similar "place limits," and a similar "first indemnity strip," to subsidize the new construction; and gave the company the right to acquire patents to sections to the extent of the amount of land contemplated by the new grant.

In addition, Congress authorized a "second indemnity strip," along the old line of 1864, and the new line of 1870, but the authorization specified that sections could be acquired in the "second indemnity strip" only in the same state or territory in which there was a deficiency in the amount of lands per mile in the original charter or grant for that same state or territory.

The Joint Resolution also added a settlement and preemption proviso not included in the 1864 act, upon which appellants rely, reading in part as follows:

> " * * * provided, that all lands *hereby granted* to said company * * * *shall be subject to settlement*

and preemption like other lands * * *." (Emphasis supplied.)

These four cases involve the ownership of lands in the "second indemnity strip" in the Territory and State of Montana for which the United States gave a patent to appellee.

Assuming for now that their procedure is that contemplated by the language of the proviso "shall be subject to settlement and preemption like other lands," and long after appellee received patents to the lands, appellants separately served upon appellee in writing instruments entitled "Application To Purchase Granted Lands," and demanded that appellee execute deeds conveying such lands to appellants at a consideration of $2.50 per acre. Appellants seek a writ of mandamus compelling appellee to make such conveyance.

The District Court quashed the writs sought, and judgment was entered in each of the four cases in favor of the appellee and against the appellants dismissing the four separate actions.

We respectfully submit that the judgments should be affirmed for the reason that no lands, either place or indemnity, were granted in Montana to appellee by the later act of 1870, that the only lands which were granted to appellee by the act of 1870 were additional lands between Portland and Puget Sound to subsidize construction of the new line. The source and origin of the title to all lands in Montana was the Act of 1864.

In addition, we respectfully submit that when, in the

later act of 1870, Congress restricted the settlement and preemption proviso to "all lands hereby granted," it intended or contemplated only the new lands granted between Portland and Puget Sound, and did not contemplate any land in Minnesota, North Dakota, Montana, Idaho, or Western Washington, all of which were acquired under and by virtue of the act of 1864.

ARGUMENT

A. *The Act of 1864.*

July 2, 1864, is the effective date of the original Northern Pacific Land Grant Act *(C. 217, 13 Stat. 365)*. Section 3 provided that at the time the line of railroad became definitely fixed, and a plat thereof was filed in the general land office, and the United States at that time had full, unencumbered title, then:

> "That there be, and *hereby is* granted to the 'Northern Pacific Railroad Company,' its successors and assigns * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States * * *."

By the foregoing, Congress defined for the Territories the "place lands" or "place limits," located in a strip 40 miles wide on either side of the completed line of road. Realizing that the United States might not have full, unencumbered title to these place lands, and that there might be a deficiency, Congress granted a right of indemnity and defined a second strip 10 miles wide, known as the "first indemnity strip," located between 40 and 50

miles from, and on either side of, the completed line of road, out of which the full amount of land granted might be fulfilled. Preceding the designation of the "first indemnity strip," Section 3 provided:

> "and whenever, prior to said time (that is, prior to the time the line of road was definitely fixed and plat filed), any of said sections shall have been * * * otherwise disposed of, *other lands* shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior * * *."

Provisions of Section 6 are of particular pertinence here. Section 6 first required a government survey for 40 miles in width on either side of the entire line of road, the width of the "place strip" in territories. It then provided:

> " * * * *the odd sections of land hereby granted shall not be liable* to sale, or entry, or preemption *before or after they are surveyed, except by said company,* as provided by this act; but the provisions of the (preemption and settlement laws) shall be, and the same are hereby, extended *to all other lands* on the line of said road, when surveyed, *excepting those hereby granted to said company.* * * *" (Emphasis supplied.)

Under the foregoing provisions the lands in the "place limits" were never subject to settlement or preemption except by appellee. Indemnity lands, on the other hand, were at all times subject to settlement and preemption like other lands until selected.

In authorizing this first line of road in 1864 between Lake Superior and Puget Sound, Congress subsidized the construction by granting a specified quantity of lands,

specific numbered sections, within defined "place limits." A defined quantity of land was contemplated. The Railroad Company was required to definitely fix the line of road, and to file its map of the definite location. On the date that map was filed, title to all those sections within the place limits which were then unencumbered, vested in the Railroad Company in praesenti as of July 2, 1864, whether surveyed or not.

Congress realized that title to many of those sections might be otherwise encumbered when the line of road became definitely fixed, and map filed, and that the full amount of land granted might not be available in the "place limits." Congress intended that the full amount granted pass to the Railroad Company. Accordingly, in addition to the "place limits," it granted a right of indemnity for any lands lost from the "place limits," designated a "first indemnity strip, and required a public survey 40 miles wide on either side along the entire line of road. If, after survey, there appeared to be a deficiency in the lands granted in the "place limits" from the amount of land originally contemplated and originally granted, the Railway Company could select replacements in the indemnity strip to make up that deficiency. The Secretary of Interior then had the duty to ascertain whether those sections selected in the indemnity strip were otherwise unencumbered as of the date of selection, and whether they were non-mineral in character. If unencumbered as of the date of selection, and non-mineral in character, it was the duty of the Secretary of Interior

to issue patents to the Railway Company for such lands selected.

Congress also desired to settle the country. It specified that indemnity lands were at all times open to settlement and preemption until settled.

Title to all sections in the "place limits" which were otherwise unencumbered when the map of definite location was filed vested immediately in the Railroad Company as of July 2, 1864. They were "lands hereby granted." They were never thereafter open to settlement or preemption.

As indicated, the right to lands in the indemnity limits likewise vested immediately as of the date the map of definite location was filed by the terms of the granting act. Title could not vest, however, until a later date of selection, and then only if the lands as of the date of selection were otherwise unencumbered and non-mineral in character. Selection for purposes of indemnification could not be made until after the survey directed by the act had been completed. Indemnity lands were open to settlement and preemption at all times until selected. They were never "lands hereby granted."

It is clear that the source of the title to indemnity lands as well as place lands, and the right to acquire such lands, arose out of the original granting act. The right of indemnification was fixed as of the moment of the granting act; the amount of land for which the Railroad Company was to be indemnified was determined as of the date the map of definite location was filed; the right to ac-

quire such lands vested as of that date by the terms of the granting act; but whether or not the right was ever to be consummated depended upon the status of the title at the later date of selection. The source of title, however, and the right to acquire title, to all indemnity lands between Lake Superior and Puget Sound arose out of the act of July 2, 1864.

B. *Legislative History of Joint Resolution of 1870.*

By 1870, there was an increasing sentiment in Congress to specifically limit land grants with some form of a settlement and preemption proviso. Some members of Congress wanted to apply such provisos to all land grants, whether new or old. Others felt it would be unconscionable to apply such a proviso to those grants which had already been given by Congress, but agreed that they should be applied to all new grants.

In considering the Joint Resolution of May 31, 1870, which authorized a new line between Portland and Puget Sound, and made a new grant of additional lands between Portland and Puget Sound, not contemplated by the act of 1864, Congressmen made repeated attempts to draft a settlement and preemption proviso that would apply to the old grant of 1864 between Lake Superior and Puget Sound, as well as to the new grant of 1870 between Portland and Puget Sound. All were defeated.

It is helpful and revealing to trace through the debates in Congress only that portion of the discussion concerning the settlement and preemption proviso upon

which the appellants now rely. There was a clear intent upon the part of Congress to apply such a provision to all new land grants, but not to affect the grant in the act of 1864, already made by Congress.

Action taken by the Senate on the Joint Resolution of 1870 is found on the following pages of the Congressional Globe: Feb. 8, Pp. 1097; Feb. 22; Feb. 28, Pp. 1584-1586; Mar. 2, Pp. 1624-1627; Apr. 7, Pp. 2480-2486, Pp. 2491-2495; Apr. 9, Pp. 2539-2547; Apr. 11, Pp. 2569-2584; Apr. 20, Pp. 2833-2848; Apr. 21, Pp. 2867-2869.

Proceedings before the House are found on the following pages of the Congressional Globe: May 5, Pp. 3263-3271; May 10, Pp. 3343-3348; May 11, Pp. 3365-3368; May 25, Pp. 3786-3798; and May 26, Pp. 3850-3853.

On February 28, the Joint Resolution, without any settlement and preemption proviso whatsoever, was taken up and first discussed *(Pp. 1584-1585).*

On March 2, Senator Wilson of Massachusetts requested to amend the Joint Resolution by adding the following:

> "The additional alternate sections of land hereby granted by this act shall be sold by the company only to actual settlers in quantities not exceeding 160 acres or quarter-section to any one settler at prices not exceeding $2.50 per acre." *(Pp. 1626-1627.)*

April 7, Senator Howell from Iowa moved to amend Wilson's proposed amendment to change the words "sections of land hereby granted by this resolution" to the

words "sections of land heretofore granted and hereby granted by this resolution." *(P. 2480).* After considerable discussion had passed on the floor of the Senate, Senator Howell then stated:

> "If the Senator will yield a moment, I understand this grant, so far as the amendment I offered is concerned, has already been made; and therefore I do not know that it becomes me at this stage to interfere to make that amendment, and so I withdraw it. But I will stand by the amendment that was offered by the Senator from Massachusetts." *(P. 2482.)*

On that same date, April 7, Senator Casserly of California renewed the amendment which had been proposed by Howell, and which Howell had withdrawn with the foregoing language. Senator Pomeroy argued with respect to an amendment that would apply the settlement and preemption proviso to the lands "heretofore granted" as well as to the lands "hereby granted":

> "If the Senator from California (Mr. Casserly) had read carefully the amendment of the Senator from Massachusetts he would have seen that all that is embraced in the new grant is put at $2.50 an acre * * *; but I apprehend the Senator from California is too good a lawyer to suppose that he can make that apply to a grant which already exists and that the company have had in their possession rightfully for several years. * * * It is a species of retrograde legislation, going backward. It is in the nature of violating a contract, which is only a little less than an immorality whenever proposed by any legislative body. While (?) Congress has power to do it, of course, I (do not?) doubt; but it certainly has not the right to do it * * *. When that was not in the original act, it is too late to put it in now." *(Pp. 2482-2483; we are uncertain of the accuracy of the language marked?.)*

* * *

"Mr. CASSERLY. I understand that the amendment which I renewed obviated that objection. If I have renewed the wrong amendment that was my mistake.

* * *

"Mr. CASSERLY. My intention was to apply the original amendment to the new grant." *(P. 2483)*

* * *

" * * * I wish to withdraw the amendment which I renewed. * * * If it undertakes to deal with the lands already granted, of course I shall not wish to offer any such amendment. * * *" *(P. 2484)*

On April 9, there was considerable discussion of the amendment proposed by Senator Wilson *(Pp. 2539-2547)*, and on April 11 some significant events took place *(Pp. 2569-2584)*. Senator Thurman of Ohio requested Wilson to temporarily withdraw his amendment so as to permit Thurman to offer an amendment *(P. 2569)*. Thurman's amendment in addition to numerous other restrictions and limitations also provided specifically "that the alternate sections of land heretofore or hereby granted to said company * * * shall be sold by said company to actual settlers upon the same, and to no other person or persons." *(P. 2569)*. With respect to that Thurman amendment, Senator Wilson stated:

"Mr. WILSON. I move to strike out in the amendment the words 'heretofore or,' so that the terms of the amendment of the Senator from Ohio will apply only to so much of the land as is granted by this Resolution, and will not interfere with the original

grant. I do not wish to take anything of that grant away." *(P. 2580.)*

Mr. Casserly then asked Senator Wilson what was before the Body. To that Mr. Wilson replied:

"Mr. WILSON. I will simply say that my amendment is to strike out the words 'heretofore or,' so that the provisions of the amendment of the Senator from Ohio shall apply to the grant now made, and not to the original grant.

* * *

"Mr. CONKLING. It makes it prospective, and not retrospective also."

Upon the vote, Wilson's motion to strike from the amendment the words "heretofore or" was passed by the Senate, and such language was stricken. *(Pp. 2581-2582.)*

The Thurman amendment as thus modified was itself rejected. On that same date, April 11, Wilson's initial proposed amendment was then put to a vote and rejected. *(P. 2584.)*

On April 20, Wilson proposed another amendment which was a form of settlement and preemption proviso applicable only to the new lands granted by the resolution. Although it was defeated, the discussions reflected the growing sentiment in Congress that all new grants of lands should be subjected to some form of a settlement and preemption proviso. *(Pp. 2842-2846).*

April 21 saw final activity in the Senate which by unanimous vote had consented that the Joint Resolution would be voted on at 3:00. Mr. Scott had offered as an amendment the settlement and preemption proviso in the

final form in which it passed, and upon which the appellants now rely, which was then included in the Joint Resolution as it finally passed on that date. *(Pp. 2868-2869).*

It is clear from examining the discussions in the House, that the House understood it was the intention of the Senate to apply the settlement and preemption proviso only to the new lands granted by the Resolution, and not to lands acquired by reason of the original Act of 1864. On May 11 and May 25, Mr. Hawley and Mr. Sargent offered amendments that all lands granted to the Company should be subject to the settlement and preemption proviso *(Pp. 3367, 3788).* Mr. Sargent then said:

> "Mr. SARGENT. The joint resolution as it passed the Senate and as now pending, provides that if after five years the lands granted by this bill are not sold they shall be subject to settlement and preemption like other lands, at not exceeding $2.50 an acre. I wish to extend that provision to all lands granted by any law to this company; * * *." *(P. 3788)*

Other amendments were likewise offered in the House to impose the settlement and preemption proviso on all lands, including those acquired under the Act of 1864, and each and all of such attempts were defeated.

The following decisions have commented upon the foregoing convincing legislative history:

N. P. v. McRae, 6 L. Dec. 400;

U. S. v. N. P., 14 S. Ct. at 603; 152 U.S. 284, 38 L. Ed. 443;

U. S. v. N. P., 61 S. Ct. at 287, 311 U.S. at 368;

Russell v. N. P. et al, 9th C.C., 238 F. (2d) 636, Cert. Den. June 24, 1957.

We respectfully submit that it is clear from the legislative history what Congress meant when it added a settlement and preemption proviso with the restrictive language "lands hereby granted." It was intended to apply the proviso only to the new and additional lands granted by the resolution between Portland and Puget Sound. It was never intended to apply the proviso to any lands, place or indemnity, in Minnesota, North Dakota, Montana, Idaho, or Western Washington, granted by the Act of 1864.

Such is even more clear when we consider, as we shall later on in this brief, those decisions of the Supreme Court of the United States which have construed the meaning of the language "lands hereby granted," and those decisions which have directly considered the meaning and effect of this settlement and preemption proviso. Appellants, of course, would have the court ignore such decisions, because with the legislative history quoted above, they make such a formidable obstacle for the appellants to overcome.

C. *The Act of 1870.*

On May 31, 1870, the Joint Resolution became effective *(Res. 67, 16 Stat. 378).* It authorized the railroad company to locate and construct a new main line between Portland and Puget Sound:

> "under the provisions and with the privileges, grants, and duties provided for in its act of incorporation."

In other words, we must read into the Joint Resolution the sections of the act of 1864, including the two of particular importance here, Sections 3 and 6. The Joint Resolution accordingly provided the same "place limits" and "first indemnity" strip, with respect to the new main line between Portland and Puget Sound:

Section 3:

"That there be, and *hereby is* granted to the 'Northern Pacific Railroad Company,' its successors and assigns * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States * * *.

" * * *

"And whenever, prior to said time (that is, prior to the time the line of road was definitely fixed and plat filed), any of said sections shall have been * * * otherwise disposed of, *other lands* shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior * * *.

Section 6 (after requiring a survey 40 miles in width):

" * * * *the odd sections of land hereby granted shall not be liable* to sale, or entry, or preemption *before or after they are surveyed, except by said company,* as provided by this act; but the provisions of the (preemption and settlement laws) shall be, and the same are hereby, extended *to all other lands* on the line of said road, when surveyed, *excepting those hereby granted to said company.* * * *" (Emphasis supplied.)

The joint resolution also created a second indemnity strip between 50 and 60 miles on either side of both the old line of road created between Lake Superior and

Puget Sound by the Act of 1864, and the new line of road between Portland and Puget Sound created in 1870, with one limitation. A replacement selection could be made in the second indemnity strip only within the same state or territory for which there was a deficiency in the basic charter or grant for that state or territory.

Again, it should be noted that if we looked only to the Sections 3 and 6 in construing the Joint Resolution, the newly granted "place lands" between Portland and Puget Sound would never be subject to settlement and preemption except by appellee, whereas indemnity lands were at all times subject to settlement and preemption like other lands. However, we have before us the foregoing debates from which Congress thereafter added the settlement and preemption proviso, specifically restricting the proviso to the "lands hereby granted" by the resolution between Portland and Puget Sound. The settlement and preemption proviso upon which these appellants rely, stated in part:

> " * * * Provided, that all lands *hereby granted* to said company * * * shall be subject to settlement and preemption like other lands * * *". (Emphasis supplied.)

The foregoing legislative history is convincing that it was intended by Congress to apply this proviso only to the additional lands between Portland and Puget Sound granted by the resolution.

In authorizing the new line of road in 1870 between Portland and Puget Sound, Congress specified that it

should be under the same terms and conditions as the original granting act for the line between Lake Superior and Puget Sound, thereby defining between Portland and Puget Sound the same "place limits" and the same "first indemnity strip."

By that time, however, the place limits and the first indemnity strip obviously were not adequate to satisfy the quantity of land granted in 1864 to subsidize the old line, and might not satisfy the quantity granted in 1870 for the new line between Portland and Puget Sound. To that end, Congress in the act of 1870 added the "second indemnity strip" for both the old line authorized in 1864, and the new line in 1870.

Patent to a section in the second indemnity strip in Montana required first, a grant in the "place limits" in Montana in the act of 1864, and second, of equal importance, the grant in 1864 of a right of indemnity in the event of a deficiency in the amount of lands in the "place limits" in Montana contemplated by the act of 1864. Whether title was ever acquired to land in an indemnity strip depended upon the later acts of survey, selection by appellee, and administrative determination of the status of title as of the date of selection. The right to acquire title, however, the source of the title was the act of 1864 and vested when the map of definite location was filed.

The act of 1870 did not purport to grant any lands to the Railroad Company in Minnesota, North Dakota, Montana, Idaho, or Western Washington. The source of title for all lands in such states or territories was still

the full amount of the original subsidy granted by Congress in the act of 1864. The act of 1870 did nothing more than authorize an additional second indemnity strip out of which the original grant of 1864 might be satisfied.

It may be helpful to examine an excerpt from the Joint Resolution which provided in part:

> "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the Northern Pacific Railroad Company be, and hereby is, authorized * * * to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, * * *; and *in the event of their not being in any state or territory* in which said main line or branch may be located, at the time of the final location thereof, *the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter,* then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within 10 miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, * * *: Provided, that all lands *hereby granted* to said company * * * shall be subject to settlement and preemption like other lands, * * *." (Emphasis supplied.)

How can the appellants seriously urge that by the foregoing language Congress was making a grant of land in the second indemnity strip in Montana?

The full quantity of lands granted in Montana was fixed as of July 2, 1864. Title to all lands "hereby granted" in the place limits in Montana vested as of July 2,

1864, and was determined as of the date the map of definite location was filed. The right to be indemnified for any deficiency was founded in the act of 1864. The amount for which the railroad was to be indemnified in Montana was determined as of the date that the map of definite location was filed. No title vested in the Railway Company to a single acre of land in Montana by the grant contemplated by the Act of 1870. The only land granted by the Act of 1870 was land between Portland and Puget Sound.

D. *Decisions Defining The Nature And Extent Of The Grants To The Railroad Company.*

Many decisions of the Supreme Court of the United States have discussed specifically the Northern Pacific land grants, and other identical land grants. We cite a few only of the cases which we feel will corroborate the foregoing analysis of the grants.

Nelson v. N. P., 1903, 23 S. Ct. 302, 188 U.S. 108, 47 L. Ed. 406;

N. P. v. Townsend, 1903, 23 S. Ct. 671, 190 U.S. 267, 47 L. Ed. 1044;

U. S. v. N. P., 1904, 24 S. Ct. 330, 193 U.S. 1, 48 L. Ed. 593;

U. S. v. N. P., 1920, 41 S. Ct. 439, 256 U.S. 51, 65 L. Ed. 825;

U. S. v. N. P., 1940, 61 S. Ct. 270, 311 U.S. 317, 85 L. Ed. 210; see later action in 41 F. Supp. 273.

See also:

Russell v. N. P., 9th C.C., 238 F. (2d) 636, cert. denied June 24, 1957, 77 S. Ct. 1400.

In addition to citing the foregoing decisions, we shall discuss in some detail later on in this brief the decision in 1940 commonly called the "Land Grant Case of 1940," and we shall also discuss in more detail the recent decision by this Ninth Circuit Court of *Russell v. The Texas Company et al, 9th C.C., 238 F. (2d) 636, cert. denied June 24, 1957, 77 S. Ct. 1400,* both of which in our opinion dispose of this litigation.

E. *Decisions Reflecting That The Only Lands Granted By The Resolution Were Between Portland and Puget Sound.*

Appellants would have the court ignore the repeated statements in various decisions that describe the lands granted by the resolution of 1870 as the lands between Portland and Puget Sound; that discuss the lands granted by the act of 1864 as all lands east of the Portland-Puget Sound line; and that have decided that the language "lands hereby granted" means those "place lands" contemplated by Sections 3 and 6 for which title passed in praesenti as of the date of the granting act, and not to the indemnity lands. Such decisions are helpful and point the way in these cases. Appellants have cited, and can cite, no authority to the contrary.

1. In *Prest v. N. P., May 23, 1884, 2 L. Dec. 506,* Secretary Teller stated:

> *"Lands within indemnity limits are not granted lands. The company as to those lands does not claim to acquire title until actual selection. (Pp. 506.)*

* * *

"These are instances of construction put upon withdrawals within granted limits. If any distinction is to be made it seems to me that the withdrawal of land *within indemnity limits* should be more strictly construed against the grantee than a withdrawal *within granted limits.* * * * Under the scheme of the granting act to the Northern Pacific Company which designates indemnity limits, and under the provision in the act that lands in lieu of those lost in place shall be selected 'under the direction of the Secretary of the Interior,' it has come to be regarded as the duty of the Secretary to withdraw from other disposition *a sufficient quantity of lands within indemnity limits to make good those lost in granted limits. (Pp. 507-508.)*

* * *

"In the latter case the lands were *within the granted limits.* In the Ryan case the land was *within indemnity limits,* * * *." *(Pp. 510.)*

Title to lands in the place limits vested immediately as of the date of the legislation. They were lands "hereby granted," whereas title to lands in the indemnity limits might never vest in the Railway Company.

2. Again, in discussing the indemnity lands of the Northern Pacific Railway Company, and the power of executive withdrawals, *2 L. Dec. 511, May 17, 1883,* Secretary Teller stated:

"In many instances acts making grants in aid of the construction of railroads provide for an executive withdrawal of the lands *within the granted limits.* These acts do not, however, generally provide for the executive withdrawal of lands *within the indemnity limit* * * *.

"Now, with respect to the definite location, the law *makes absolute grant, with precision from that*

date as to particular lands, because those lands are immediately identified as a whole—being the alternate sections on each side of said road. The circumstances or status of each tract—whether 'vacant' or 'appropriate'—can then be ascertained. When ascertained it either falls within the grant as of its date or fails to pass on account of such exception as the law declares.

"As to indemnity, the law gives at date of definite location, not title but a right to acquire title by selection—based on the deficiency ascertained as above. And the provision of 1870 rests on a possibility that at date of definite location there may be in some state or territory a want of sufficient lands in the limits fixed in 1864, on account of subsequent disposals, to make the full original grant, and allows the deficiency thus caused to be supplied beyond the original limits." *(Pp. 513-514, Pp. 515.)*

3. On September 30, 1887, in *Northern Pacific v. McRae, 6 L. Dec. 400,* Secretary Lamar discussed the extent of the grant between Portland and Puget Sound, basing authority for it solely in the later resolution of 1870:

"Now, the grant provided for in its act of incorporation is every alternate section of public land not mineral (except coal and iron) designated by odd numbers to the amount of twenty alternate sections per mile on each side of said railroad line, through the Territories of the United States, and ten sections per mile on each side of said railroad whenever it passes through any State.

"I am clearly of the opinion that by the joint resolution of May 31, 1870, Congress intended *that the grant* of twenty sections per mile on each side of the road to aid in the construction of said road should be extended to the whole line of the road including that part of the main line via the valley of the Columbia river through Portland to Puget Sound. This

conclusion based alone upon the language of the joint resolution would be confirmed, if confirmation was necessary, by the debates in Congress upon said resolution while it was pending and make clear the manifest purpose of said resolution.

"(Quoting from the significant debates in Congress.)"

4. To the same effect as the foregoing is the decision of *Northern Pacific Railroad Company v. Davis, July 25, 1894, 19 L. Dec. 87.*

5. In discussing the conflicting grants between the Northern Pacific and the Oregon & California Railroad Company, Secretary Noble, February 17, 1892, in *14 L. Dec. 187,* stated:

"It will be seen that the effect of said resolution was to change the branch to main line, and vice versa, *and also to provide for a land grant for the new line—viz: a connecting piece between Portland, Oregon, and Puget Sound. (Pp. 188)* * * *"

"In your instructions to the Register and Receiver at Oregon City, Oregon, dated January 19, 1891, (not reported), under the forfeiture act, it was held by you that, *east of Portland, Oregon, the grant for the Northern Pacific Railroad Company is under the Act of July 2, 1864* (supra), *(Pp. 188)* * * *

"The Act of 1864 made the location of the grant therein provided for, in this vicinity, reasonably certain, and the location of 1865 imparted additional information upon the subject. The Joint Resolution of 1870 merely changed the name of this part of the line, by designating it as the main line, instead of the branch line, *but the grant remained under the Act of 1864, (Pp. 189-190)* * * *. This applies with equal force in the present controversy, and having determined that the grant for the Northern Pacific Railroad Company, east of Portland, Oregon, is under the Act of July 2, 1864 * * *." *(Pp. 190).*

6. Secretary Smith, March 21, 1894, in *18 L. Dec. 255,* said:

> "The original grants made by the Act of Congress, approved July 2, 1864 (13 Stat., 365), provided for a branch line terminating at Portland, Oregon.
>
> *"By the Resolution of May 31, 1870 (16 Stat., 378), this grant was made to apply to the line provided for by the Resolution of April 10, 1869 (16 Stat., 57), which provided for an extension of the branch line from Portland to Puget Sound.* It is true that the Resolution of May 31, 1870 (supra), changed the branch line to the main line, and provided for a continuous line to Puget Sound by way of Portland, *but this Department has always held that there are two grants, and that the grant from Portland north was made by the Resolution of May 31, 1870."*

7. Prior decisions of the Supreme Court have clearly shown that no lands were granted by the Joint Resolution of 1870, except those in aid of the Portland-Tacoma line.

In *United States v. Northern Pacific Railroad Company, 1894, 14 S. Ct. 598, 152 U.S. 284, 38 L. Ed. 443,* the Court held that the Joint Resolution "should be regarded as giving a subsidy of lands in aid of the construction of a *new* road, not before contemplated, that would directly connect Portland and its vicinity with Puget Sound."

8. In *Northern Pacific Railway Company v. DeLacey, 1899, 19 S. Ct. 791, 174 U.S. 622, 43 L. Ed. 1111,* the land in controversy was within the primary limits of the 1870 land grant for the Portland-Tacoma line as definitely located, and the 1864 Cascade Branch, as definitely located across the Cascade Mountains to Puget

Sound. The Court held that the Company acquired title to the land under the 1864 Act. It said *(Pp. 628):*

"The defendant contends that the land in controversy was excluded by operation of law from the grant of 1864 by the resolution of May 31, 1870. Herein he assumes that the effect of that resolution was to blot out the grant under the act of 1864. The resolution did not have that effect. It was not an amendment to the third section of the act of 1864 which granted the lands."

9. In *Hewitt v. Schultz, 1901, 21 S. Ct. 309, 45 L. Ed. 463, 180 U.S. 139,* the Court said:

"An answer to these questions may be found in the act of July 2d, 1864, as interpreted by the Land Department for many years past. We will now advert to such of the provisions of that act as are pertinent to the present inquiry.

"By the 3d section of the act Congress granted to the Northern Pacific Railroad Company (quoting section 3).

"This section has been often under examination by this court, and in repeated decisions it has been held that the act of Congress '*granted* to the Northern Pacific Railroad Company *only* public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time its line of road was definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office,'—lands that were not, at that time, free from pre-emption or other claims or rights being excluded from the grant. (Citing many cases.); and authorities cited in each case. The cases all speak of the granted lands *as those within the place limits." (21 S. Ct. at 311.)*

10. In *United States v. Northern Pacific, 1904, 24 S. Ct. 330, 193 U.S. 1, 48 L. Ed. 593,* the Court, after cit-

ing the Act of 1864 as making a grant in aid of the construction of a railway from Lake Superior to some point on Puget Sound, said:

> "On May 31, 1870, Congress passed a joint resolution making an additional grant to the same company for the location and construction of 'its main road to some point on Puget Sound via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound." *(16 Stat. at Large 378.)*
>
> *"The line east of Portland provided for in the Act of 1864* formed nearly a right angle at Portland *with the line from there to Puget Sound provided for in the Joint Resolution, and thus the two grants overlapped,* and the lands in suit fell within the overlap. * * * While the line from Portland to Puget Sound and east across the Cascade Mountains was built and the *grants earned."*

11. In the Land Grant Case of 1940, the *United States v. Northern Pacific Railway Company, 1940, 61 S. Ct. 264, 85 L. Ed. 210, 311 U.S. 317,* the court so held. Since we shall discuss the case fully later on, we shall not duplicate here.

12. In *Russell v. Texas Company, 9th C.C., 238 F. (2d) 636, cert. denied June 24, 1957, 77 S. Ct. 1400,* this Court described the grant of 1870 as follows:

> " * * * In 1870, Congress passed a resolution which * * * granted additional lands in Oregon and Washington to the Company."

13. *Argument of Appellants.*

We respectfully submit that the foregoing constitute an abundance of authority reflecting that the Joint Reso-

lution granted no lands in Montana. The source of title to lands in Montana is the original act of 1864. The only lands granted by the resolution of 1870 were between Portland and Puget Sound.

Appellants, at pages 22 and 23 of their brief, cite authorities which we feel support this view. Indemnity lands in any state are acquired as a part of the basic grant for the state in which they are acquired. Indemnity lands in Minnesota, North Dakota, Montana, Idaho, and Western Washington are acquired as a part of the 1864 grant. The only indemnity lands acquired as a part of the 1870 act are between Portland and Puget Sound. In this connection the appellants state:

> "The railroad company was to receive a specified amount of land measured by the primary provision of the grant relative to the place lands. The only purpose apparent for the indemnity provision was to replace lands which were for some reason not available in the place limits. When those lands were acquired they obviously become as much a part of the grant as were the lands within the place limits. In the case of United States v. N.P. Railway Co., 256 U.S. 51, 41 Sup. Ct. 439, 65 L. Ed. 825, 828, we find the following language of the Supreme Court of the United States demonstrating this proposition:
>
> > " 'The provision relating to indemnity lands *was as much a part of the grant* and contract as the one relating to land in place (Payne v. Central P.R. Co. 255 U.S. 288, ante, 598, 41 Sup. St. Rep. 314), and it is apparent from the granting act and resolution that "it was the purpose of Congress in making the grants to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits." Weyerhaeuser v.

Hoyt, 219 U.S. 380, 387, 55 L. Ed. 258, 261, 31 Sup. Ct. Rep. 300.' (Emphasis supplied)

"This proposition is also supported by the case of Southern Pacific Railroad Co. v. Bell, 22 Sup. Ct. 232, 183 U.S. 679, 46 L. Ed. 386, and by the very quotation from that case which is set forth in the opinion of the court below (R. 28).

"' * * *Undoubtedly the company acquires title to both classes of lands by the 3d section of the granting act;* but it acquires a title to lands within the place limits by a present grant; but to land within the indemnity limits, only by a future power of selection. *In both cases the statute is the origin of the title;* but in the one case it gives instantaneously; in the other it is a mere promise to give in the future, and requires the action of the railroad to perfect it. The words "hereby granted" evidently refer to the former.' (Emphasis supplied)."

The foregoing quotation from pages 22 and 23 of appellants' brief states our position with clarity. The Joint Resolution made an additional grant of lands in the place limits between Portland and Puget Sound; gave a right of indemnity in the event of a deficiency; and defined both a first and a second indemnity strip out of which the grant could be fulfilled.

As to the lands east of the Portland-Puget Sound line, the company acquired no title under the Joint Resolution. Before appellee was given a patent by the United States to any lands in the "second indemnity strip" in Montana, there had to be first a grant of place lands in Montana by the act of 1864; and second, a grant in the act of 1864 of the right of indemnity in the event of a deficiency in the grant for the place limits. As stated by the Supreme

Court of the United States in the Forest Reserve Case, *U. S. v. N. P., 41 S. Ct. 439, 256 U.S. 51, 65 L. Ed. 285,* in *Payne v. Central Pac. R. Co., 41 S. Ct. 314, 255 U.S. 228, 65 L. Ed. 598,* and *Southern Pacific v. Bell, 22 S. Ct. 232, 183 U.S. 679, 46 L. Ed. 386,* the source of the title to all lands in Montana was the act of 1864; the company acquired title to both place and indemnity lands in Montana by the 3rd section of the act of 1864; in both cases, the act of 1864 was the origin of the title.

Paraphrasing the statement at page 22 of appellants' brief, the railroad company by the act of 1864 was to receive a specified amount of land measured by the primary provision of the grant relative to the place lands in Montana. The only purpose for the indemnity provision was to replace lands which were granted by the act of 1864 in the place limits in Montana, but which were for some reason unavailable in those limits. When those lands in Montana were acquired, whether first or second indemnity, they were as much a part of the grant of 1864, as were the lands within the place limits. In all three cases—place, first indemnity, or second indemnity—the act of 1864 was the origin of the title.

F. *Decisions Reflecting That The Restrictive Language Of The Resolution Of 1870—"all lands hereby granted"—Did Not Contemplate Land In Montana.*

It is not only our view that the resolution granted no lands in Montana, but it is also our view that when Congress used the restrictive language limiting the settlement and preemption proviso to "all lands hereby granted,"

it contemplated only those lands within the place limits between Portland and Puget Sound to which title passed in praesenti as of the date of the resolution. Once again the appellants would have the court ignore the decisions construing the meaning of such language. Appellants, of course, cite no cases to the contrary.

In *Hewitt v. Schulz, 21 S. Ct. 309, 45 L. Ed. 463, 180 U.S. 139,* decided on January 7, 1901, the court had to expressly decide what lands Congress contemplated and intended by the language "lands hereby granted" as used in sections 3 and 6 of the Act of 1864. The court held that only the place lands, title to which passed in praesenti as of the date of the act, were contemplated. Such language did not apply to indemnity lands. Hewitt, homestead patentee, filed suit in ejectment against Schultz, a purchaser from the N. P. R. Co. which asserted ownership by reason of the land grant act. The land involved was within the first indemnity strip in the Territory of North Dakota. The opinion relates the history with reference to the definite location of the road. A map designating the general route was filed March 30, 1872. On April 22, 1872, the Secretary of Interior ordered a withdrawal of all lands in the place limits shown on the map of general route. On June 11, 1873, map of definite location was filed. On June 24, 1873, the land department ordered a withdrawal of all lands in the first indemnity strip. The land in dispute was located in that first indemnity strip. On April 10, 1882, Hewitt settled on the lands and thereafter qualified for a patent unless he was

barred from doing so by the earlier withdrawal order of June 24, 1873. No selection had been made by the company before April 10, 1882. In fact it was not until March 19, 1883, that the company filed its "selection list" embracing the land involved. The Department of the Interior relying on *N. P. v. Miller, 7 L. Dec. 100,* and *N. P. v. Davis, 19 L. Dec. 87,* held that the lands in the indemnity limits did not fall within the place or granted limits, were not included in the term "hereby granted" as used in Sec. 6 of the act of July 2, 1864, and were open to settlement under the public land laws until a selection had been made by the company. Patent was issued to Hewitt. The ejectment action followed. The Supreme Court of the United States quoted Section 3 of the act of July 2, 1864, and thereafter said:

> "This section has been often under examination by this court, and in repeated decisions it has been held that the act of Congress '*granted* to the Northern Pacific Railroad Company *only* public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights *at the time its line of road was definitely fixed,* and a plat thereof filed in the office of the Commissioner of the General Land Office,'—lands that were not at that time, free from pre-emption or other claims or rights being excluded from the grant. (Citing many cases.) The cases all speak of the granted lands as those within the place limits."

The court next quoted section 4 of the act of July 2, 1864, following which it said with respect to Section 6:

> "But so far as the present case is concerned the

most material section of the act is the 6th. That section provided: (Quoting Section 6) * * *.

"It is contended that, construing the 3d and 6th sections together, it is clear that the words, 'the odd sections of land hereby granted,' in the first part and the word 'excepting those hereby granted to said company,' in the latter part, of the 6th section, refer to the lands described in the 1st section of the act,—that is, to the odd-numbered sections in the place limits which were free from pre-emption or other claims or rights, and had not been appropriated by the United States prior to the definite location of the road; that as to 'all other lands on the line of the said road, when surveyed,' the act expressly declares that the provisions of the pre-emption act of 1841 and the acts amendatory thereof, and of the homestead act of 1862, should extend to them; that Congress took pains to declare that it did not exclude from the operation of those statutes any lands except those granted to the company in the place limits of the road, which were unappropriated when the line of the railroad was definitely fixed; and that if, at the time such line was 'definitely fixed,' it appeared that any of the lands granted, that is, lands in the place limits, had been sold, granted, or otherwise appropriated, then, but not before, the company was entitled to go into the indemnity limits beyond the 40-mile and within the 50-mile line, and, under the direction of the Secretary of the Interior, and not otherwise, select odd-numbered sections to the extent necessary to supply the loss in the place limits. It is also contended that the object of the reference in the 6th section of the Northern Pacific act to the pre-emption and homestead acts could only have been to bring the odd-numbered sections in the indemnity limits within the operation of those acts.

"This construction of the act of July 2d, 1864, finds support in legislation enacted subsequently and before the railroad company filed its map of general route. By a joint resolution approved May 31st, 1870,

Congress declared (quoting from the Joint Resolution).

"Thus, it seems, a second indemnity limit was established into which the company could go and obtain lands in lieu of lands lost to it in the granted or place limits."

The court next discussed prior opinions of the Land Department including *Atlantic & P. R. Co., Aug. 13, 1887, 6 L. Dec. 84,* and quoted from *N. P. R. Co. v. Miller, 7 L. Dec. 100,* cited above. The court then held:

"It was admitted at the hearing that the construction of the Northern Pacific act of 1864 announced by Secretary Vilas had been adhered to in the administration of the public lands by the Land Department. We are now asked to overthrow that construction by holding that it was competent for the Land Department, immediately upon the definite location of the line of the railroad, to withdraw from the settlement laws all the odd-numbered sections within the indemnity limits as defined by the act of Congress. If this were done, it is to be apprehended that great if not endless confusion would ensue in the administration of the public lands, and that the rights of a vast number of people who have acquired homes under the pre-emption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed. Of course, if the ruling of that office was plainly erroneous, it would be the duty of the court to give effect to the will of Congress; for it is the settled doctrine of this court that the practice of a department in the execution of a statute is material only when doubt exists as to its true construction.

"But without considering the matter as if it were for the first time presented, it is sufficient to say that the question before us cannot be said to be free from doubt. The intention of Congress has not been so clearly expressed as to exclude construction or argument in support of the view taken by Secretaries La-

> mar, Vilas, and Smith, and upon which the Land Department has acted since 1888. 'It is the settled doctrine of this court,' as was said in United States v. Alabama G.S.R. Co. 142 U.S. 615, 621, 35 L. Ed. 1134, 1136, 12 Sup. Ct. Rep. 308, 'that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.' These observations apply to the case now before us, and lead to the conclusion that if the practice in the Land Department could with reason be held to have been wrong, it cannot be said to have been so plainly or palpably wrong as to justify the court, after the lapse of so many years, in adjudging that it had misconstrued the act of July 2d, 1864. The order of withdrawal by the Secretary of the Interior, upon which the title of the railroad company depends, being out of the way, there is no legal ground to question the title of the plaintiff to the land in dispute."

It is noted that there was a dissent in the case of *Hewitt v. Schultz.* For that reason the subsequent opinion of the court in *Southern Pacific Railroad Company v. Bell, January 13, 1902, 22 S. Ct. 232, 183 U.S. 679, 46 L. Ed. 386,* is important. That case involved the Southern Pacific land grant, an Act on July 27, 1866, a land grant identical with that of the Northern Pacific. Because of the importance of the issue involved, the court reviewed the *Hewitt v. Schultz* case, reviewed the entire background of the issue, and specifically and expressly affirmed the decision. In the Southern Pacific case, the

land was within the indemnity limit in a state rather than a territory. The court said in part:

"Treating this case as a reargument of the question involved in Hewitt v. Schultz, and it practically comes to that, we still adhere to the principle there announced. It seems to us the more reasonable, if not the necessary, inference to be deduced from the language of Sections 3 and 6. By the former there is *'hereby granted* . . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state.' These words terminate the grant, the remainder of the clause being immaterial in this connection, and if the whole clause had been followed by a period, instead of a semi-colon, the meaning, perhaps, would have been clearer. But there follows another clause, that 'whenever, prior to said time, any of said sections, or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be *selected* by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections,' etc. There is here a clear distinction between the lands granted *in praesenti* by the company, whenever the deficiency in the granted lands shall be ascertained.

"The 6th section carries out the same idea. It requires a survey of 40 miles in width on both sides of the entire line, whether passing through states or territories. This would include only the granted or place limits within a territory, but within a state would cover the indemnity limits as well. There was no order in the act to withdraw any lands from settlement or sale, but such withdrawal seems to have been made in pursuance of the practice of the Interior Depart-

ment, and for the purpose of preventing lands granted to the railroad company from being taken up by settlers, before the completion of the line and the final issue of patents. As was said by Mr. Secretary Lamar in the Atlantic & P. R. Co. 6 Land Dec. 84: 'Waiving all questions as to whether or not said granting act took from the Secretary all authority to withdraw said indemnity limits from settlement, it is manifest that the said act gave no special authority or direction to the executive to withdraw said lands; and when such withdrawal was made it was done by virtue of the general authority over such matters possessed by the Secretary of the Interior, and in the exercise of his discretion; so that, were the withdrawal to be revoked, no law would be violated, no contract broken.' But as the power to withdraw extends only to the *'lands hereby granted'* and all other lands, except those hereby granted, remain open to settlement, we are thrown back upon Sec. 3 to determine what are the lands 'hereby granted.'

* * *

"We are therefore of opinion that the act of July 27, 1866, did not authorize the withdrawal by the Secretary of the Interior of the indemnity lands, that such lands remained open to homestead and preemption entry, and that patents issued to settlers within such indemnity limits, based upon the entries made prior to the selection by the railroad company, approved by the Interior Department, were valid as conveyances of the land as against the selection by the railroad company."

In view of the foregoing decisions, it is manifestly clear that the language "hereby granted" in the settlement and preemption proviso of the resolution applied only to the "place lands" in the new and additional grant between Portland and Puget Sound. It did not apply to any lands in Montana.

G. *Decisions Which Have Considered and Passed Upon Whether The Settlement And Preemption Proviso Applies To Any Lands In Montana.*

We do not accept nor agree with the suggestion of appellants that the basic issue involved has not been decided. We submit that it has been decided by the Supreme Court of the United States followed by a pertinent decision of this Ninth Circuit Court.

1. *United States v. N. P., 1940, 61 S. Ct. 264, 311 U.S. 317, 85 L. Ed. 210.*

Both the 1864 act, and the resolution of 1870, were altered and amended by Congress by the Act of June 25, 1929 *(46 Stat. 41, 43 U.S.C.A., Sections 921-929).* The Attorney General was directed to procure a judicial determination of all controversies and disputes arising out of the Act of 1864 and the Joint Resolution of 1870. Pursuant to the mandate, an action was commenced against the Northern Pacific Railway Company which was thereafter litigated and decided in *United States v. Northern Pacific Railway Company, 1940, 61 S. Ct. 264, 311 U.S. 317, 85 L. Ed. 210.* The government argued in that case that the settlement and preemption proviso applied to all lands between Lake Superior and Puget Sound, including those in the second indemnity limits; that when the Railway Company failed to open all lands to settlement and preemption, it thereby breached its contract with the government with respect to the land grant. The government urged the breach in two separate and distinct aspects: first, that it was one of six breaches which, either

standing alone or considered together with the other alleged breaches, was so substantial that the Railway Company was not entitled to any further performance by the government; second, that in any event the government was entitled to a determination of the amount of damages sustained from the breach by way of set-off. The court first discussed the legislative history of the land grant, and the nature and extent of the land grant, pointing out that by the Act of 1864 place lands were granted in praesenti between Lake Superior and Puget Sound, as well as a first indemnity strip, and that the Joint Resolution of 1870 authorized a new line between Portland and Puget Sound, and made a new grant of land in connection therewith, on the same terms as the original grant. *(61 S. Ct. 268-273; 311 U.S. 324-335; 85 L. Ed. 217-223.)* The opinion thereafter discussed the six alleged breaches which the government argued either standing alone, or considered all together, disentitled the Railway Company to any further performance *(61 S. Ct. 273-276, 311 U.S. 335-342, 85 L. Ed. 223-226).* Paragraph 4 constituted the first aspect in which the government relied upon the alleged breach of the settlement and preemption proviso of 1870 *(61 S. Ct. at 273, 311 U.S. at 337, and 85 L. Ed. at 224).* At the conclusion of its discussion of those six alleged substantial breaches, including paragraph 4, the opinion then said:

> "The justices who heard this case are equally divided in opinion upon these issues. No opinion is expressed upon them, and they are reserved, in view

of the fact that our rulings on other issues may be dispositive of the entire controversy.

"The Government puts forward certain further claims which, if sustained, would preclude any recovery by the company." *(61 S. Ct. at 275-276, 311 U.S. at 341-342, 85 L. Ed. at 226.)*

The decision went on to discuss those other issues which the court felt might dispose of the entire controversy. Among those, paragraph 18 was the second aspect in which the government urged that the settlement and preemption proviso applied to all lands between Lake Superior and Puget Sound, including second indemnity lands, and that the government was entitled to a determination of the damages sustained by way of set-off. The Court held unequivocally with respect to that argument:

"18. The company's failure to open lands granted by the Resolution of 1870 to settlement and preemption.

"The company's alleged breach in this aspect as a defense to the company's entire claim is mentioned in heading 4, supra.

* * *

"We hold, contrary to the Government's assertion, that the proviso of the Resolution of 1870, requiring the lands be opened by the company to settlement and preemption applies only to the *additional lands granted by that Resolution* (emphasis supplied) and not to lands acquired under the grant of 1864. * * *

* * *

"A majority of the justices who heard this case are of the opinion that the proviso of the Resolution of 1870 required the company to open the lands *granted*

by the Resolution (emphasis supplied) to preemption and settlement at the expiration of five years from the completion of the entire road in 1887, whether the lands were then subject to mortgage or not; * * *." *(61 S. Ct. 287-288, 311 U.S. at 367-369, 85 L. Ed. at 238-239.)*

What the Court meant by "the additional lands granted by that Resolution" is elsewhere in the Court's opinion made clear, and is reflected in the many decisions referred to above. The Court said of the Joint Resolution:

a.) "May 21, 1870 * * *. It further authorized the location and construction of the main railroad via the valley of the Columbia River to Puget Sound and of a branch from the main line across the Cascade Mountains to Puget Sund, and made a grant of land in connection with the construction authorized between Portland and Puget Sound, on the same terms as the original grant." *(61 S. Ct. 269; 311 U.S. at 326.)*

b.) "The Resolution of May 31, 1870, granted, as respects the additional line authorized between Portland and Puget Sound, place and indemnity lands, as granted for the original line by the Act of 1864. It also authorized what are spoken of as 'second indemnity belts' * * *." *(61 S. Ct. at 270, 311 U.S. at 328.)*

c.) "An additional line was authorized by the Joint Resolution of 1870 and a land grant made therefor." *(61 S. Ct. at 274, 311 U.S. at 337.)*

The Court's understanding that all lands other than those in aid of the Portland-Tacoma line were "lands acquired under the grant of 1864," to which it held the proviso of the Resolution of 1870 inapplicable, is made clear by the Court's discussion of the Company's claim to indemnity resulting from the Tacoma overlap, appeal

No. 4 by the Company *(61 S. Ct. 289-291; 311 U.S. 372-376)*. The Court said:

> "20. *The company's claim to indemnity resulting from the Tacoma overlap.*
>
> "In its appeal (No. 4) the company challenges the rejection of its claim for loss of selection rights in second indemnity limits appurtenant to the Portland-Tacoma line. It is urged that the Joint Resolution of 1870, *which made a grant in aid of this line,* authorized the creation of second indemnity limits, in the event that there was a deficiency of lands in first indemnity limits, to supply loss of place lands lying along the route. The company insists that when in 1892, 1902 and 1906, 213,000 acres of land were withdrawn and placed in national forests, these withdrawals deprived the company of selection of odd-numbered sections in second indemnity limits, as the 1870 grant was deficient in 1882, the date of the definite location of the last segment of the Portland-Tacoma line, and so remained." (Emphasis Supplied) *(61 S. Ct. at 289, 311 U.S. at 372.)*

The Court after stating:

> "For an understanding of the contention certain facts must be borne in mind."

then discussed the nature and extent of the two grants. It stated significantly:

> "Thus the resolution altered what had been the proposed main line across the Cascade Mountains into a branch line, and the former branch to Portland into a section of the main line running down the Columbia River to Portland and thence turning north to Puget Sound. Although by an Act of 1869 the company had been authorized to construct a line between Portland and Tacoma, and a right of way had been granted therefor, no grant of lands in aid of such construction was made until the adoption of the Resolution of 1870." *(61 S. Ct. at 289, 311 U.S. at 373.)*

The Court next pointed out that the grant of place lands and indemnity for this new road between Portland and Puget Sound was the same as the grant in the charter act; discussed the authorization for second indemnity, stating that Congress was informed from the legislative history that because of prior settlement and preemption there was a deficiency of lands available to satisfy the original grant, and for that reason a second indemnity strip was authorized; and then said:

> "The Resolution made a *new grant* in aid of the Portland-Tacoma line. The portion of the Cascade branch (designated as main line in the Act of 1864) entering Tacoma from the east was definitely located in 1884. This location defined the place lands granted by the Act of 1864. The line authorized by the Joint Resolution entering Tacoma from the south was definitely located in 1874, thus earning the grant made by the Resolution. * * *
>
> "Whether Congress intended, in connection with its *later grant of 1870,* to accord the company indemnity for failure to receive, in aid of the Portland-Tacoma line, lands to which it would get title in virtue of its definite location of the Cascade line, is the question. We conclude that Congress did not so intend.
>
> "It is true that the grant of 1870 was upon the same terms as that of 1864. Unquestionably the company, in respect of the line built under the later grant, was entitled to indemnity for lands granted or disposed of by the United States to others prior to the grant. Indeed, it would be entitled to indemnity for loss due to an earlier overlapping grant to another railroad. The grant of 1864, carried title to the lands within the overlap to the company and, therefore, Congress could not and did not make a second grant of the same lands in 1870. Did Congress intend to grant the company indemnity for a *preceding grant,*

not to a stranger, but to the company itself? * * *." (Emphasis Supplied) *(61 S. Ct. at 290-291, 311 U.S. at 374-376.)*

In posing and answering this question, the Court clearly considered that all lands opposite the Cascade line were acquired under the act of 1864. We note that the Court cited in explanation of the statement in a footnote, prior opinions quoted from in subdivision E above which held that the resolution did not blot out or amend section 3 of the act of 1864 which granted the lands; that the grant east of Portland was under the act of 1864; that the line north of Portland was granted under the act of 1870; that there were two grants which overlapped; that the resolution gave a subsidy of new lands between Portland and Puget Sound for the construction of a new road not contemplated before.

The Court clearly had in mind that the only additional lands granted by the resolution were lands between Portland and Puget Sound; and held that the proviso applied only to those lands.

The date of construction did not limit the extent of the grants. No such provision can be found in the granting acts.

Furthermore, when the Supreme Court said in the Land Grant Case of 1940, that the proviso of the Joint Resolution applied only to the additional lands granted by that Resolution "and not to lands acquired under the grant of 1864" it certainly did not mean, as appellants argue, that the proviso was limited to those lands earned

by construction prior to May 31, 1870, for it knew that construction did not begin until February 15, 1870, and that no lands had been so earned and certified to the Company on May 31, 1870, the date of the passage of the act.

Accordingly, we respectfully submit that the Government in the Land Grant Case of 1940 urged upon the Supreme Court of the United States that the settlement and preemption proviso of the resolution of 1870 applied not only to the new lands granted by the resolution between Portland and Puget Sound, but that it also applied to all the lands between Lake Superior and Puget Sound, acquired under the act of 1864, including the second indemnity lands involved in these pending cases. The Court held unequivocally that the proviso applied only to the new lands between Portland and Puget Sound granted by the resolution.

2. Following the foregoing decision in 1940, the United States and the Northern Pacific Railway Company adjusted all their differences, and District Judge Swellenbach entered a decree which in effect quieted title in appellee to all lands patented to respondent under the various land grant acts. See *41 F. Supp. 273,* August 28, 1941. The disposition contemplated all damages sustained by reason of any failure to open to settlement or preemption the additional lands granted by the Resolution of 1870.

3. *Russell v. N. P. R. Co., et al, 9th C.C., 238 F. (2d) 636, cert. denied June 24, 1957, 77 S. Ct. 1400,* is a

pertinent decision. In that case, the same counsel represented Russell as represent these appellants. They made the same argument to this Court as the Government made to the Supreme Court of the United States in the Land Grant Case of 1940—that is, that "the lands subject to the proviso were all of the lands of the grant from Lake Superior to Puget Sound, and the same lands which might be subjected to the one 'mortgage by this Act authorized'." They made no particular issue of the fact the Russell lands were in the place limits. It was not considered a controlling fact. They supported their position at the time of argument with the same argument now advanced in brief.

Appellee in the Russell case made substantially the same argument as it makes here—that is, that the Resolution of 1870 granted no lands in Montana; that the restrictive language "lands hereby granted" contemplated only the new lands between Portland and Puget Sound granted by the resolution; and that the issue was decided in the Land Grant Case of 1940. In its opinion this Court described the grant of 1870 as a grant of "additional lands in Oregon and Washington." This Court rejected the argument that the Resolution of 1870 made a grant of lands in Montana. It accepted the argument of appellee that the Joint Resolution granted no lands in Montana.

After so defining the grant of 1870 as a grant of additional lands in Oregon and Washington, this Court discussed the opinion of the District Judge that the issue had

been decided by the Supreme Court of the United States, and by way of explanation in footnote 4 said:

> "4. United States v. Northern Pacific Railway Co., supra, grew out of an action which the government brought against the Northern Pacific Railway Co. to recover damages, *inter alia,* for the wrongful disposition of some of the lands granted it in 1864 and in 1870, claiming that the proviso clause in the Resolution of 1870 applied to all the lands granted in 1864 as well as the additional lands granted in 1870. The Supreme Court in an opinion by Mr. Justice Roberts stated 311 U.S. at page 368, 61 S. Ct. at page 287:
>
> " 'We hold, contrary to the Government's assertion, that the proviso of the Resolution of 1870, requiring that the lands be opened by the company to settlement and preemption applies only to the additional lands granted by that Resolution and not to lands acquired under the grant of 1864. * * *'
>
> "The court then added in a footnote that the legislative history was so convincing that it could reach no other conclusion." *(238 F. (2d) at 639.)*

After holding Russell barred by estoppel, this Court then held significantly:

> "Even if we felt constrained to recognize the right of Russell to raise the question of the validity of the mineral reservation by virtue of the two granting acts, we are convinced that the holding in United States v. Northern Pacific Railway Co., 1940, 311 U.S. 317, 61 S. Ct. 264, 85 L. Ed. 210, is determinative of this issue." *(238 F. (2d) 640-641.)*

In view of the nature of the briefs and arguments in the Russell case, we consider the opinion as significant authority in support of the appellee in these pending cases. The fact that the Russell lands were in the "place limits"

whereas these lands are in the "second indemnity limits" did not influence Russell's argument or brief, nor his basic position. He argued that the appellee did not acquire title to any lands in Montana by the Act of 1864; that by the Resolution of 1870 Congress gave a new and increased title by removing the mortgage restriction of the Act of 1864; that by acceptance of the Resolution of 1870 there was a regrant of all the lands; and that the settlement and preemption proviso applied to all lands regardless of whether they were place or indemnity. It was substantially the same argument as the government had previously advanced in the Land Grant Case of 1940.

When this Court held that the only lands granted by the Resolution of 1870 were the additional lands in Oregon and Washington it effectively disposed of the Russell case and these pending cases.

Accordingly, we respectfully submit that not only has the Supreme Court of the United States determined exactly the same issue with respect to these same indemnity lands in the land grant case of 1940, this Ninth Circuit Court has decided a basic issue by holding in the Russell case that the only lands granted by the Resolution of 1870 were the additional lands in Oregon and Washington.

ANSWER TO ARGUMENT OF APPELLANTS

The foregoing discussion answers most of the argument advanced by appellants and we shall not burden this brief with a step by step refutation of all points.

With respect to the discussion of the Land Grant Case

of 1940, we simply submit that appellants misconstrue and misstate what was actually considered and held by the Court in that case. As above pointed out, the Court did hold definitely that the resolution granted additional lands between Portland and Puget Sound, that the proviso "applies only to the additional lands granted by that resolution and not to lands acquired under the grant of 1864." The only point upon which it reserved decision was whether the Company's breach of the proviso by refusal to open lands subject thereto to settlement and preemption, together with other breaches of covenant claimed by the Government, had been so substantial as to disentitle it to call for further performance by the United States, or to recover any money compensation for abrogation of its selection rights. The statements on page 31 of the appellants' brief that "the Court reserved the question as to whether the *proviso* applied to every part of the granted lands on the issue of forfeiture of right to further awards of lands" and that the Court "did not attempt to delineate the lands which were 'acquired' by Northern Pacific under the Act of 1864," are clearly incorrect, for the Court expressly held the proviso applicable only to the additional lands granted by that resolution between Portland and Puget Sound.

The appellants advance no substantial reason for doubting the correctness of the construction placed on the proviso by the Supreme Court in its 1940 decision or the controlling effect of that decision upon this litigation.

With respect to the argument that appellee has a positive duty to convey to these appellants, it is based first of all on the erroneous assumption that the proviso applies to lands in Montana. In the second place, it assumes rights in appellants which they do not have.

The proviso, obviously, is not self-executing, and it does not purport to confer rights on anyone but the United States. The lands subject to the proviso were granted to the Railroad Company in fee, but subject five years after completion of the entire road "to settlement and preemption like all other lands." Since other lands subject to settlement and preemption were only unappropriated public lands, the proviso was nothing more than a reservation by the United States of a power of disposition under the preemption and homestead laws, with an implied covenant on the part of the Railroad Company to permit such disposition. While a refusal to open lands subject to the proviso to preemption and settlement at the expiration of the five-year period, would constitute a breach of the Company's contract with the United States, only the United States could complain thereof. This was so decided in *Oregon & Cal. R. R. v. United States, 238 U.S. 393, at pages 431-436, 35 St. Ct. 908, 59 L. Ed. 1360,* in respect of a much more specific proviso "That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser and for a price not exceeding two dollars and fifty cents per acre."

As a matter of interest, it is noted that Northern Pacific Railroad Company did not open the lands granted by the Joint Resolution to preemption and settlement at the expiration of five years from the completion of the entire road, because those lands remained subject to the mortgages authorized by the Resolution, and it construed the proviso as subjecting to settlement and preemption only lands which did not then remain subject to the mortgage, as appeared to be the plain meaning of the proviso; that the Commissioner of the General Land Office took the position that there was no authority in the officers of the Land Department of the United States to issue regulations providing for the entry under any of the public land laws of lands which had been earned by the Railway Company, or to accept payment for the lands, or to allow entry thereof, and was sustained by the First Assistant Secretary of the Interior in *38 Land Decisions 77;* that the Supreme Court of the United States held that failure to open lands granted by the Resolution to preemption and settlement at the expiration of five years from the completion of the entire road in 1887, whether the lands were then subject to the mortgage, or not, was a breach of its contract with the United States, and that the Government was entitled, if it could, to prove any damage to it, or advantage to the Company, which resulted from this breach of contract *(U.S. v. N.P. Ry. Co., 311 U.S. 317, 368),* and that thereafter a compromise settlement was effected, with the approval of the court,

under which the Company relinquished its claim to additional lands, and compensation for lands, and consented to judgment against it and in favor of the Government for three hundred thousand dollars, and the Government relinquished its claims against the Company *(U.S. v. N.P. Ry. Co., 41 F. Supp. 273)*. Obviously, the failure to open the lands granted by the Resolution to preemption and settlement at two dollars and fifty cents per acre, could not entitle purchasers to relief when it was held to warrant a recovery of damages by the United States which were then paid.

So far as the comments of appellants are concerned with respect to Congressional intent, the legislative history of the Joint Resolution leaves no doubt that it was the intent of Congress to confine the settlement and preemption proviso to the additional lands between Portland and Puget Sound granted in aid of the construction of the Portland-Tacoma line. In the face of such clear evidence of congressional intent found in the legislative history of the Joint Resolution, there is certainly no point in endeavoring to ferret out a different intent from the language of the resolution itself. And, of course, the language of the act of 1929 does not purport to determine or influence decision as to the application of the settlement and preemption proviso.

CONCLUSION

We respectfully submit that from the language of the act of 1864, the legislative history of the Joint Resolu-

tion of 1870, the language of the Joint Resolution of 1870, and the many decisions referred to above, that the only lands granted by the Resolution of 1870, were the new and additional lands between Portland and Puget Sound. No lands in Montana were granted by the Joint Resolution of 1870. Title to all lands in Montana was acquired by appellee by reason of the grant of 1864.

When Congress inserted the restrictive language in the setlement and preemption proviso of 1870—that is, "all lands hereby granted shall be subject to settlement and preemption like other lands,"—Congress contemplated and intended only the new and additional land in Washington and Oregon granted by the Resolution to aid in the construction of the new Portland to Puget Sound line. That such was the intention of Congress is reflected by the decisions of the Supreme Court of the United States which have considered and construed directly what was meant by Congress when it used that restrictive language "land hereby granted."

Finally, we respectfully submit that the same issue with respect to second indemnity land involved in this case was submitted by the Government to the Supreme Court of the United States in the Land Grant Case of 1940, and was rejected by the court in that case. We further respectfully submit that the same basic issue of whether the only lands granted by the Joint Resolution of 1870 were the lands in Oregon and Washington along the Portland-Puget Sound line was submitted to and de-

cided by this Ninth Circuit Court in the Russell case. In accepting the argument of appellee that the Joint Resolution granted no lands in Montana, and that the only lands granted by the Resolution were the new and additional lands between Portland and Puget Sound, this Ninth Circuit Court has already decided a basic issue of this case against the appellants.

We respectfully submit that the judgment of the lower Court should be affirmed.

Respectfully submitted,
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